Chapter 1

Overview of Higher Education Law

Sec. 1.6. Religion and the Public-Private Dichotomy

1.6.3. Government support for religious institutions and their students and faculty members.

The U.S. Supreme Court added to its roster of establishment clause decisions in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019). At issue in the case was a 32-foot tall Latin cross that was erected in 1925 to local soldiers who had died in World War I that was located on public property and maintained using public funds. A divided federal appellate court panel agreed with the respondents that displaying the cross on public property was unconstitutional, and a request for an en banc rehearing was denied. Reversing the appeals court, the U.S. Supreme Court held that the display and maintenance of the cross did not violate the establishment clause.

Justice Alito, delivering the Court’s judgment, though with several parts of his opinion not joined by a majority of justices, offered four considerations in cases such as the one at hand involving monuments, symbols, or practices: (1) such “cases often concern monuments, symbols, or practices that were first established long ago … and identifying their original
purpose or purposes may be especially difficult;” (2) “as time goes by, the purposes associated with an established monument, symbol, or practice often multiply;” (3) the message “conveyed” may evolve over time, with Justice Alito stating that “[w]ith sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community’s landscape and identity” and a community may value them “without necessarily embracing their religious roots,” and (4) removing a long-standing monument, symbol, or practice that has come to be associated with a community and attained “historical significance … may no longer appear to be neutral … [and] will strike many as aggressively hostile to religion.”

According to Justice Alito’s opinion, World War I monuments such as the one at issue implicated each of these four points. With these considerations in mind, the Court decided that the cross did not violate the establishment clause. The majority concluded that the cross’ purposes must be interpreted in light of a historical “background” in which the memorial’s design was influenced in large part by the “simple wooden crosses” originally used to mark the graves of American soldiers killed in World War I. Additionally, noted Justice Alito in a part of his opinion speaking for the majority, the memorial had gained “historical importance” over time.

Despite upholding the constitutionality of the cross display, a majority of the court did not agree on a specific legal rationale for doing so. In a section of the opinion joined by three other justices, Justice Alito stated that the Lemon test (see LHE6th Sec. 1.6.3) had presented “daunting problems” in cases, such as the one at hand, “that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations.” Instead, he turned to other precedent, including Marsh v. Chambers, 463 U.S. 783 (1983), and Town of Greece v. Galloway, 572 U.S. 565 (2014), involving prayer before legislative sessions
as instructive. In a concurring opinion, Justice Kavanaugh was also critical of Lemon, stating that the Court’s decision in the present case, and in previous cases such as Marsh, “demonstrate that the Lemon test is not good law and does not apply to Establishment Clause cases in any of the five categories.” Other opinions offered by Justices Thomas and Gorsuch were also deeply critical of Lemon. In contrast, in a brief concurring opinion, Justice Kagan stated, “Although I agree that rigid application of the Lemon test does not solve every Establishment Clause problem, I think that test’s focus on purposes and effects is crucial in evaluating government action in this sphere—as this very suit shows.” Justice Ginsburg—joined by Justice Sotomayor—stated in her dissenting opinion that cross was a Christian religious symbol, and the sectarian purposes and symbolism of the cross was not negated by its use as a war memorial. In the American Legion case, while a majority of the court agreed with the constitutionality of displaying the cross, the contrasting opinions from the justices reveal ongoing disagreement over application of establishment clause principles.

Chapter 2

Legal Planning and Dispute Resolution

Sec. 2.2. Litigation in the Courts.

2.2.2 Access to court.

2.2.2.1 Jurisdiction. As explained on p. 119 of LHE6th, the federal courts have limited jurisdiction, and the plaintiff must demonstrate that the court has jurisdiction over both the subject matter and the parties to the dispute. When a public university claims that it is protected by sovereign immunity, the court must determine whether or not it can exercise jurisdiction over the defendant. In Maliandi v. Montclair State University, 845 F.3d 77 (3d Cir. 2016), for
example, the U.S. Court of Appeals for the Third Circuit determined that Montclair State University was protected by sovereign immunity from the plaintiff’s claims of FMLA violations. The court based its conclusion on the degree of control over the university by the governor and the state’s Secretary of Higher Education, as well as the fact that the university is subject to the state’s Administrative Procedure Act and its civil service laws.

Section 2.3. Alternative Dispute Resolution

2.3.3. Applications to colleges and universities.

p. 168 A Pennsylvania trial court rejected a claim by the state system of higher education that an arbitrator’s award violated public policy. In Pennsylvania State System of Higher Education, Lock Haven University v. Association of Pennsylvania State College and University Faculties, 193 A.3d 486 (Cmwlth Ct. Pa. 2018), Lock Haven University challenged an arbitration award reinstating a faculty member. Pennsylvania state law, revised after the Penn State sexual abuse scandals, required that all faculty teaching courses in which minors were allowed to enroll must be free of criminal histories of sexual offenses. Lock Haven had performed a background check on its faculty who taught dual-enrollment classes and had learned that a professor, hired 14 years earlier, had been convicted of a sexual offense 27 years earlier. Lock Haven had dismissed the professor upon learning of the prior conviction because he taught entry-level courses in mathematics in which high school students enrolled. The arbitrator reinstated the professor, but ruled that he could not teach courses in which high school students were enrolled at the college. The arbitrator noted the young age at which the professor engaged in the offending conduct (19), his unblemished performance and strong teaching record at Lock Haven, and ruled that restricting him to courses in which minors were not allowed to enroll did not constrain Lock
Haven’s managerial rights to assign work to employees. The court agreed and confirmed the arbitration award.

Chapter 3
The College and Its Trustees and Officers

Sec. 3.3. Institutional Tort Liability

3.3.1. Overview. For a recent ruling applying New Jersey’s charitable immunity doctrine, see also Green v. Monmouth University, 178 A.3d 83 (N.J. Super. Ct. App. Div. 2018) (upholding award of summary judgment to defendant university on charitable immunity grounds in slip-and-fall case brought by nonstudent plaintiff injured at concert held on university property but organized by entities not affiliated with the university).

3.3.2. Negligence

3.3.2.5. Liability for cocurricular and social activities

Errata:

On p. 251 of LHE6th, the discussion of the Guest case should read:

Similarly, in Guest v. Hansen, 603 F.3d 15 (2d Cir. 2010), a federal appellate court ruled that staff of Paul Smith’s College (a private college) did not have a duty to protect a student from injuries sustained in a snowmobile accident. The college was located on a lake, which the college did not own. Students had a practice of building bonfires on the frozen lake and using it as a location for consuming alcohol. A student and his guest went for a snowmobile ride around the lake; the student’s blood-alcohol content at the time was over 0.11%. The snowmobile crashed and the two were killed. The guest was twenty years old and not under the influence of alcohol at the time of the accident.
The guest’s father sued Paul Smith’s College and its director of residence life for negligence, stating that college administrators knew that students were consuming alcohol and partying on the frozen lake and neither attempted to stop the partying nor enforced the college’s alcohol policy. The court affirmed the trial court’s ruling that neither the college nor the director of residence life owed the decedents a duty of care because they were not on property controlled by the College. Even if the college had the ability to control the off-campus activities of its students and their guests, said the court, it had no obligation to do so.

Chapter 4

The College and Its Employees

Section 4.5. Collective Bargaining

4.5.6. Students and collective bargaining

In December of 2019, the U.S. Court of Appeals rejected an attempt by the University of Chicago to deny students who work in its libraries the right to bargain under the National Labor Relations Act. In University of Chicago v. NLRB, the university had refused to bargain with a unit certified by the NLRB, arguing that the students were temporary employees and thus ineligible to unionize under the Act. The court rejected the University’s argument that the student employees were ineligible to bargain, citing the NLRB’s 2016 ruling in Columbia University, 364 N.L.R.B. No. 90 (2016), in which the Board ruled that graduate students at Columbia who had a common law employment relationship with the University were eligible to bargain under the Act, despite the temporary nature of their jobs. Since the University had not asked the appellate court to overrule the Board’s Columbia University decision, the appellate court ruled in favor of the NLRB.
In September of 2019, the NLRB issued a Notice of Proposed Rulemaking that would provide that “students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies are not ‘employees’ within the meaning of Section 2(3) of the Act.” 84 Fed. Reg. 49691 et seq. The Board noted that such a regulation would “bring stability to an area of federal labor law in which the Board, through adjudication, has reversed its approach three times since 2000.” If these regulations are adopted by the Board and survive any subsequent legal challenges, they would be contrary to the holding in the University of Chicago case, discussed above.

Section 4.6. Other Employee Protections

4.6.2. Fair Labor Standards Act. The U.S. Department of Labor has updated and revised the regulations pertaining to exempt employees (29 C.F.R. Part 541). Employees who are exempt from entitlement to overtime payments (if they work more than 40 hours in one week) must earn a salary of at least $684 per week, an increase from the $455 per week under the previous version of the regulations (an annualized rate of $35,568.00).

Section 4.7. Personal Liability of Employees

4.7.4. Constitutional liability (personal liability under Section 1983)

4.7.4.2. Issues on the merits: State-created dangers. The state-created danger theory continues to be used by plaintiffs, but with limited success. In Jones v. Pi Kappa Alpha International Fraternity, Inc. et al., 765 F. Appx. 802 (3d Cir. 2019), a case in which the plaintiff alleged that the college created the danger that facilitated her rape by several fraternity members, the U.S. Court of Appeals for the Third Circuit ruled that Ramapo State College is an arm of the state and
thus the individual defendants (college officials) were protected by Eleventh Amendment immunity. The court concluded that the officials were also protected by qualified immunity because the plaintiff’s claim that they failed to act to prevent the assault did not create the danger.

Chapter 5

Nondiscrimination and Affirmative Action in Employment

Section 5.2. Sources of Law

5.2.1. Title VII.

A case from the Ninth Circuit addressed a former faculty member’s claim that an otherwise neutral hiring requirement created an illegal disparate impact on individuals on the basis of their national origin. A federal appellate court affirmed the ruling of a district court that rejected a plaintiff faculty member’s attempt to state a claim of disparate impact under Title VII of the Civil Rights Act of 1964 (Title VII). As in Scott v. University of Delaware, discussed on p. 472 of LHE6th, (in which the U.S. Court of Appeals for the Third Circuit rejected a claim that a PhD hiring requirement for faculty discriminated against individuals on the basis of race), the plaintiff alleged that Central Washington University’s requirement that tenure track faculty members in its business school must have received a PhD from a university accredited by the Association to Advance Collegiate Schools of Business (AACSB) had a disparate impact on candidates on the basis of national origin. Kucuk v. Central Washington University, 2018 U.S. Dist. LEXIS 204322 (W.D. Wash., Dec. 3, 2018), affirmed, 778 Fed. App’x. 525 (9th Cir. 2019). The trial court noted that the defendant university had hired numerous faculty in its business school who were not born in the United States, but who had received their PhD from an AACSB-accredited university, and that this requirement was common across business schools in the
United States. The plaintiff’s degree was from a Turkish university that was not accredited by the AACSB. Ruling that the hiring requirement was a neutral practice that was a business necessity for the university because of the importance of maintaining accreditation, the trial court awarded summary judgment to the university. The appellate court summarily affirmed.

5.2.3. **Title IX.** Some faculty members who are accused of, and found responsible for, sexual harassment are using Title IX to allege that the discipline imposed was based upon their gender. These claims are typically unavailing. See, for example, *Robinson v. Howard University*, 335 F. Supp. 3d 13 (D.D.C. 2018) (law professor who used graphic, sexually suggestive language in a quiz and lecture on agency law was issued a letter of reprimand. The court dismissed his claim, stating that a reprimand was not an adverse employment action).

5.2.10. **Laws prohibiting sexual orientation discrimination.**

P. 505. The U.S. Supreme Court heard oral arguments in the *Zarda* case and another one presenting similar issues during its October 2019 term. No decision had been announced as of late January 2020.

**Section 5.3. The Protected Classes**

5.3.8. **Transgender/gender identity or expression.**

p. 552. After *LHE6th* went to press, the creators of the *Diagnostic and Statistical Manual V* of the American Psychological Association removed gender identity disorder from its list of mental illnesses and replaced it with gender dysphoria. And in May of 2019, the World Health
Organization’s International Classification of Disorders 11 (ICD-11) removed gender dysphoria from its list of mental illnesses.

For a recent case involving a transgender faculty member who alleged that she was denied tenure, harassed, and retaliated against because she was transitioning from male to female, see *Tudor v. Southeastern Oklahoma State University*, 2017 U.S. Dist. LEXIS 177654 (W.D. Okla. 10/26/17); 2018 U.S. Dist. LEXIS 96884 (6/6/18) (jury verdict for plaintiff on discrimination, harassment and retaliation claim).

On October 4, 2017, the U.S. Attorney General issued a memorandum to U.S. Attorneys entitled “Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964.” The memo takes the position that Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status. . .the Department of Justice will take that position in all pending and future matters (except where controlling lower-court precedent dictates otherwise, in which event the issue should be preserved for potential further review). The memorandum may be found at https://www.justice.gov/ag/page/file/1006981/download.

Chapter 6

Faculty Employment Issues

Section 6.3. Faculty Collective Bargaining

6.3.2. Coexistence of collective bargaining and traditional academic practices.
After the U.S. Supreme Court released its decision in the Janus case (LHE6th, pp. 359-361), faculty members at several public universities challenged the constitutionality of their state’s public sector employee bargaining law. For example, in Reisman v. Associated Faculties of the University of Maine et al., 939 F.3d 409 (1st Cir. 2019), a professor at the University of Maine at Machias challenged Maine’s law, Me. Stat. tit. 26, §§ 1021-1037, that provides for collective bargaining by faculty at Maine’s public colleges and universities. The plaintiff alleged that the law violated his First Amendment right not to associate with an organization whose views he opposes and compelled his speech by forcing him to associate with that organization because the organization acted as his personal representative. The plaintiff was not a member of the union, nor, after Janus, was he required to pay an agency fee to the union.

Reading the language of the statute, the court rejected the plaintiff’s claim that the union was his personal representative; the union was the representative of the bargaining unit, according to several parts of the statute. Furthermore, said the court, Janus dealt with the forced payment of agency fees and did not address the issue of “forced” association with the union more generally. Citing a previous First Circuit case, D’Agostino v. Baker, 812 F.3d 240, 244 (1st Cir. 2016), which held that "[E]xclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit," the appellate court affirmed the trial court’s dismissal of the plaintiff’s lawsuit.

For a similar argument by plaintiffs and similar outcomes, see Grossman v. Hawaii Government Employees Association AFSCME et al., 382 F. Supp. 3d 1088 (D. Haw. 5/21/19) and Uradnik v. Inter Faculty Association et al., 2019 U.S. Dist. LEXIS 209957 (D. Minn. 12/5/19). All three court opinions cited the ruling of the U.S. Supreme Court in Knight
(discussed in Section 6.3.2 of LHE6th) to reject plaintiffs’ claims that laws permitting a union selected by majority vote of the bargaining unit to be the exclusive representative of those bargaining unit members violated their freedom of association.

Section 6.4. Application of Nondiscrimination Laws to Faculty Employment Decisions

6.4.2. Challenges to employment decisions.

6.4.2.1. Race and national origin discrimination claims. Although most challenges to tenure denials result in a ruling for the institution, some courts are rejecting defendant institutions’ arguments that courts should defer to the academic judgments of the faculty and administrators. In Mawakana v. Board of Trustees of the University of the District of Columbia, 2019 U.S. App. LEXIS 17899 (D.C. Cir. 6/14/19), an Africa-American professor of law at the University of the District of Columbia was denied tenure. Believing that the denial was based on his race, he sued, alleging race discrimination and breach of contract claims. Referring to the caution of the U.S. Supreme Court in the Ewing case (discussed in LHE6th, section 2.2.5), the court said:

We believe that Ewing and the concept of academic freedom do not entitle a university to special deference in Title VII tenure cases. Indeed, the first premise of the deference afforded the university in Ewing was that the university had “acted in good faith.” . . . That premise cannot be assumed in a Title VII case, where the question is whether the employer acted in good faith. The second premise of the Court’s deference in Ewing was that the Court was being asked to review “the substance of a genuinely academic decision.” . . . That premise also cannot be assumed in a Title VII case, where a court is asked to evaluate the reason for—as opposed to the substance of—the University’s decision and thus whether the employer’s decision was “genuinely academic.” In sum,
Ewing dictates that a court cannot second-guess a university’s decision to deny tenure if that decision was made in good faith (i.e., for genuinely academic reasons, rather than for an impermissible reason such as the candidate’s race). But a Title VII claim requires a court to evaluate whether a university’s decision to deny tenure was made in good faith (i.e., for academic reasons rather than for an impermissible reason such as the applicant’s race). [2019 U.S. App. LEXIS 17899 at *7–8]

6.4.3. Judicial deference and remedies for tenure denial. For a recent example of a court’s refusal to defer to the academic judgment of internal decision-makers, see Hatcher v. Board of Trustees of Southern Illinois University, 2017 U.S. Dist. LEXIS 179370 (S.D. Ill. 10/30/17) (rejecting defendants’ claim that court should defer to the academic judgment of the president, who made the final promotion and tenure denial decision).

6.4.4. Challenges to salary decisions. A particularly troubling issue in salary discrimination claims is the determination of whether pay differentials are, in fact, caused by sex or race discrimination or by legitimate factors such as performance differences, market factors, or educational background. These issues have been debated fiercely in the courts and in the literature. For example, in Summy-Long v. Pennsylvania State University, 715 F. Appx. 179 (3d Cir. 2017), a federal appellate court found that the lower salary paid to a female medical school professor was explained by the fact that her publication record was weaker than those of comparable male faculty and that she had not obtained required grant funding. Claims brought under Title VII and Title IX were equally unavailing.

In Freyd v. University of Oregon et al., 384 F. Supp. 3d 1284 (D. Ore. 2019) a federal trial court plunged into the complexities of the academic workplace, and concluded that faculty, even those working in the same department, may have jobs that are insufficiently similar to
qualify as “the same job” for Equal Pay Act purposes. Jennifer Freyd, a professor of psychology at the University of Oregon for over thirty years, sued the University, claiming that the fact that her salary was lower than that of four male faculty in her department was a result of sex discrimination by the University.

The court disagreed, explaining

[T]he notion of academic freedom spawns an environment where those working in the same discipline may choose to follow different paths of knowledge and pursue endeavors that create unique value to the institution. . . Individual professors are given broad latitude to pursue research, obtain and manage grants, publish written work, and take on leadership roles in the university. . . A second hurdle facing pay equity. . . is the need for universities to offer competitive salaries in order to attract top faculty. . . the academic job market is made up of those who are in demand (and can command more money during contract or retention negotiations) and those who are not. (384 F. Supp. 3d at 1288)

The male professors with whom Professor Freyd compared herself had obtained external offers of employment, which the university had met, and/or had served in administrative roles, such as department head or center director, director of clinical training, or principal investigator on large federal grants. All of these activities, said the court, were a legitimate reason for a salary differential.

Section 6.6. Standards and Criteria for Faculty Personnel Decisions

6.6.3. Denial of tenure. As noted on LHE6th pp. 674-677, courts have rejected claims by plaintiffs denied tenure that using collegiality as a criterion for making these decisions violates nondiscrimination laws. In Miller v. Sam Houston State University, 2019 U.S. Dist. LEXIS 169895 (S.D. Tex. 9/30/19), a female professor who had frequent disputes with her faculty
colleagues and was removed from several doctoral committees for alleged harm to students was denied tenure. The court rejected the plaintiff’s sex discrimination, retaliation, and hostile work environment claims and awarded summary judgment to the university, having found that the plaintiff was unable to demonstrate that male faculty who behaved in ways comparable to the behavior for which she was criticized were treated more favorably.

Section 6.7. Procedures for Faculty Employment Decisions

6.7.2. The public faculty member’s right to constitutional due process.

6.7.2.5. Other personnel decisions. Faculty at public colleges and universities who face discipline may have a right to a pre-discipline due process hearing (or in unusual cases, to a hearing after the decision has been made). For example, in Poulard v. The Trustees of Indiana University, 2018 U.S. Dist. LEXIS 167617 (N.D. Ind. 9/28/18), a professor of political science made allegedly racist, sexist, and homophobic comments in a class on Latin American politics, and frequently kissed female students. When confronted with student complaints, he claimed that his speech was protected by the First Amendment. The university disagreed, and suspended him for a semester without pay. Poulard sued, claiming procedural due process violations and retaliation for protected speech. The court disagreed, awarding summary judgment to the university on both claims.

With regard to the due process claim, the court ruled that the plaintiff had received notice of the charges against him and had been given an opportunity to respond—all that is required by Roth and Sindermann (LHE6th, pp. 684-85). Similarly, the court rejected the plaintiff’s claim that his speech was protected.
The plaintiff had argued that his speech was protected because he taught political science and thus the court should recognize a broad scope of appropriate topics for classroom discussion. The court disagreed:

[P]laintiff's course was a course involving Latin American politics, an issue that was not addressed in any of the statements at issue. Second, the court recognizes that faculty members have some right to engage in academic debates, pursuits, and inquiries. . . . And being a political science course should give professors some leeway to delve into topical or hot-button issues social and political issues. However, statements about gays being "disgusting," criticizing religious (Muslim) clothing, and asserting that African Americans should be "hung," are not topical statements and do not invoke hot-button issues. They sound much more like harassing statements that IUN has a strong interest in eliminating in order to foster an inclusive learning environment for all students, including gays, Muslims, and African Americans. (2018 U.S. Dist. LEXIS 167617 at *30)

In Renken v. Board of Regents of the University of Wisconsin System, 2019 U.S. Dist. LEXIS 185831 (E.D. Wisc. 10/28/19), faculty in the mechanical engineering department of the University of Wisconsin-Milwaukee filed a complaint against the plaintiff, a tenured professor, alleging “abusive, disruptive and bullying behavior” by the professor. A faculty committee was asked to review the charges, found them to be sustained, and recommended discipline. After additional charges were made against the plaintiff, the chancellor placed the plaintiff on unpaid suspension for a year, rescinded his sabbatical, and banned him from campus.

Renken alleged due process violations in how the decisions were investigated and made, and also requested a preliminary injunction. The trial court dismissed the lawsuit, stating that the
University had adequate remedies to protect the plaintiff’s due process rights, which he had failed to utilize.

6.7.3. The private faculty member’s procedural rights. In Fagal v. Marywood University, 2019 U.S. App. LEXIS 30220 (3d Cir. 2019), a federal appellate court considered whether a private university’s decision to terminate a tenured faculty member without following its progressive discipline policy breached the professor’s contract. Marywood is a Catholic institution founded by an order of nuns, whose president is a member of that order. Fagal engaged in a dispute with the president and other university administrators over their decision to remove flyers he had posted that advertised an upcoming event. Fagal created and released to the faculty two videos in which he compared the president and several administrators to Hitler and other Nazi leaders. The president asked Fagal to meet with her and informed him that he was placed on leave and that she was considering his termination. Fagal requested a hearing before a faculty hearing panel, which upheld the president’s termination decision.

Fagal sued for breach of contract, claiming that the Faculty Handbook, whose terms were incorporated into his employment contract, contained a provision providing for progressive discipline for two categories of misconduct: “personal and professional problems that may be rectified by an informal educational process” and “serious violations of professional responsibilities implicating possible recommendation for suspension or termination.” Fagal argued that the progressive discipline policy applied to both types of misconduct while the university stated that it was not necessary to use progressive discipline for serious violations. The trial court ruled for the university, holding that the language in the policy was permissive, not mandatory. The appellate agreed, although one judge dissented, and would have found that the
progressive discipline policy was mandatory and that the university’s failure to follow that policy breached Fagal’s contract.

Despite the ruling in the university’s favor, it is important for both public and private institutions to clarify which policies and procedures are intended to be binding on the institution and which are optional. In many cases, following one’s policy takes less time and is less costly than bypassing those policies and facing litigation.

Chapter 7

Faculty Academic Freedom and Freedom of Expression

Sec. 7.1. General Concepts and Principles.


Sec. 7.2. Academic Freedom in Teaching

7.2.2.2. The classroom.
In *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019), a federal appellate court held that a professor’s classroom speech that dealt with the professor’s sex life and those of her students did not address a matter of public concern in rejecting the professor’s as-applied First Amendment challenge to the university’s sexual harassment policies. The court, in agreement with the lower court (see *LHE*6th pp. 801-802), stated that the “use of profanity and discussion of her sex life and the sex lives of her students was not related to the subject matter or purpose of training Pre-K-Third grade teachers.” 919 F.3d at 885.

*Meriwether v. Trustees of Shawnee State University*, 2019 WL 4222598 (S.D. Ohio 9/5/19), dealt with the unsettled question of whether faculty classroom speech may qualify for First Amendment protection in light of the U.S. Supreme Court’s decision in *Garcetti v. Ceballos* (see *LHE*6th Sec. 7.1.5 and Sec. 7.2). The case involved whether a faculty member at a public university had a First Amendment right, despite a university policy to the contrary, to refuse to use a student’s requested name or preferred pronoun. During a class session, the professor, Meriwether, answered a student question with a “Yes, sir” response. After class, the student informed the professor that she was transgender and identified as female and wanted the professor to use feminine titles and pronouns when referring to her. After their exchange, the student reported the incident to an administrator, who suggested to the professor that if he did not want to follow the student’s request, he should refer to all students by their last names and “‘eliminate all sex-based references from his expression.’” The professor continued to use titles for other students, but only used a last name when referring to the transgender student. The student eventually objected to this arrangement, and the professor and administrators were unable to come to an arrangement that Meriwether’s supervisors believed would not violate institutional policy or potentially result in a violation of the student’s Title IX rights. A formal
disciplinary action resulted in which the plaintiff received an official warning letter for violating the university’s nondiscrimination policy.

In response to the professor’s First Amendment retaliation claim, the federal district court considered whether his classroom speech related to the student qualified for First Amendment protection. The court rejected the university’s argument that the professor’s actions toward the student constituted conduct and not speech. It then considered the professor’s argument that the speech at issue was exempt from the standards announced in *Garcetti v. Ceballos*. In *Garcetti*, the Supreme Court held that when a public employee engages in speech pursuant to the carrying out of official duties, then such speech is not eligible for First Amendment protection. The court in *Meriwether*, stating that the Supreme Court in *Garcetti* left undecided the issue of an academic freedom exemption, rejected the professor’s argument that federal appellate courts had recognized such an exemption, including the U.S. Court Appeals for the Sixth Circuit. The court stated that neither the Supreme Court nor the Sixth Circuit had “decided that *Garcetti* does not apply, or that it applies in a different manner, to teachers at public colleges and universities.” On the basis of *Garcetti*, the court concluded that the professor’s speech related to the student’s pronouns and gender identity occurred as part of Meriwether carrying out his official employment duties. As such, the speech did not qualify for First Amendment protection and could not be used to sustain a First Amendment retaliation claim. Even assuming that the professor’s speech was made in a capacity as a private citizen rather than as an employee, the court concluded that such speech did not touch on a matter of public concern so as to be protected by the First amendment.
Sec. 7.6. Administrators’ Authority Regarding Faculty Academic Freedom and Freedom of Expression.

In *Wozniak v. Adesida*, 932 F.3d 1008 (7th Cir. 2019), a federal appellate court, in an sharply worded opinion, rejected a professor’s arguments that his speech arising from a conflict with a group of students over a faculty teaching award was protected under the First Amendment. The professor, who “waged an extended campaign” against the students who had not given him an award, was dismissed from his tenured faculty position for his treatment of them. As characterized by the court, the professor’s “lead argument,” which the court soundly rejected, was that the First Amendment “entitles faculty members to make available to the public any information they please, no matter how embarrassing or distressful to students.” The court concluded that the speech was unprotected under *Garcetti* because it dealt with official duty or, alternatively, because the speech only touched upon matters of private concern.

Chapter 8

The Student-Institution Relationship

Sec. 8.1. The Legal Status of Students.

8.1.4. Student academic freedom.

Errata:

On *LHE6th* pp. 934-936, the discussion of the *Pompeo* case should read:

In a case arising in the same federal circuit as *Axson-Flynn*, a graduate student claimed that her professor and others had violated her First Amendment rights by criticizing a paper she had written in which she expressed negative opinions about lesbians. In *Pompeo v. Board of Regents of the University of New Mexico*, 58 F. Supp. 3d 1187 (D.N.M. 2014), Pompeo had
enrolled in a class that promised “There’s controversy built right into the syllabus, and we can’t wait to hash out our differences.” When Pompeo turned in a class paper criticizing a film involving lesbians that class had been assigned to watch, and criticizing lesbianism in general, the instructor met with her to discuss the difference between a thesis statement and an opinion, and told her she needed to rewrite the paper in order to get a grade.

According to the plaintiff, the professor’s supervisor, also a defendant in the lawsuit, warned her that her views on lesbianism would result in “consequences” if she persisted in these views. The supervisor attempted to work with the plaintiff to help her understand the need, in academic writing, to provide support for statements made, particularly controversial ones. The student refused to rewrite the paper and stopped attending the class. Although the university refunded her tuition for the course, she sued the professor and the supervisor, alleging violation of her First Amendment rights.

The trial court disagreed with the university’s defense that, although Pompeo’s speech was protected by the first amendment, a university may impose restrictions on student speech if they are reasonably related to legitimate pedagogical concerns, as stated in Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) (discussed in Section 6.2.2). Citing both Brown v. Li and Axson-Flynn v. Johnson, the court rejected the notion that the instructor’s treatment of Pompeo was based upon “legitimate pedagogical concerns.” The court said:

The First Amendment violation in this case arises from the irreconcilable conflict between the all-views-are-welcome description of the forum and Hinkley’s only-those-views-with-which-I-personally-agree-are-acceptable implementation of the forum. Plaintiff has made out a case that no reasonable educator could have believed that by criticizing lesbianism, Plaintiff’s critique fell outside the parameters of the class, given
the description of the class set out in the syllabus. This is not a case like Brown v. Li ... in which a student was given reasonable standards for accomplishing an assignment and consciously disregarded them. Furthermore, the forum as described by the syllabus was designed for older students, who could be expected to have the emotional and intellectual maturity to deal with controversial or even invidious opinions.

The Court questions whether a university can have a legitimate pedagogical interest in inviting students to engage in “incendiary” and provocative speech on a topic and then punishing a student because he or she did just that. Simply because Plaintiff expressed views about homosexuality that some people may deem offensive does not deprive her views of First Amendment protection. ... Plaintiff has made out a plausible case that Hinkley ostracized her because of Hinkley’s personal disagreement with Plaintiff’s ideology, and not for a legitimate pedagogical purpose. (58 F. Supp. 3d at 1189–90)

A second ruling by the trial court in 2015, however, awarded summary judgment to the individual defendants and the university. Pompeo v. Board of Regents, 2015 U.S. Dist. LEXIS 190134 (D.N.M. 9/22/15). The trial court, having the benefit of more information about the communications between the plaintiff and the defendant faculty members, as well as guidance from Quinn v. Young, 780 F.3d 998 (10th Cir. 2015), a case decided by the 10th Circuit after the trial court’s first decision, ruled that the professors were protected by qualified immunity. (In Quinn, the 10th Circuit had ruled that a determination that a matter was “clearly established law” should not be made at a “high level of generality,” but must rely on “cases of controlling authority,” such as rulings by the 10th Circuit or the U.S. Supreme Court in a case with very similar facts.) The trial court in its previous ruling had relied on the Axson-Flynn case to find that a student’s classroom speech was protected by the First Amendment. But under the teaching of
Quinn, said the trial court in its second opinion, “Although Axson-Flynn most certainly clarified the law governing the first amendment rights of university students, it established fairly general principles, and its facts were materially distinguishable from the facts of the present case” [2015 U.S. Dist. LEXIS 190134 at *21-22]. The court explained:

Tenth Circuit law is unsettled as to the relationship between a finding that restrictions on student speech are reasonably related to legitimate pedagogical concerns and a finding that [the] instructor harbored subjective hostility to the student's viewpoint. There is no clear answer as to which finding controls liability under the First Amendment in a Hazelwood context. The Court concludes that the law as it existed in March and April of 2012 would not have provided Professor Hinkley with fair warning that she could be held liable for violating Plaintiff's First Amendment rights based on her subjective hostility to Plaintiff's homophobic speech even if the restrictions she imposed on Plaintiff's speech were reasonably related to legitimate pedagogical concerns [2015 U.S. Dist. LEXIS 190134 at *23-24].

On appeal, the federal appellate court affirmed the award of summary judgment to the defendants. Pompeo v. Board of Regents, 852 F.3d 973 (10th Cir. 2017). The appellate court characterized the student’s class work as “school sponsored speech,” as discussed in Hazelwood, noting that “[r]egardless of the competing policy goals that might be considered in assessing whether school-sponsored speech should be restricted, Axson-Flynn does not clearly prohibit educators from restricting school-sponsored speech based on viewpoints that they believe are offensive or inflammatory” (852 F.3d at 986).

Turning to the defendants’ claim that they were protected by qualified immunity, the court was required to determine whether, in fact, the alleged restrictions on the plaintiff’s speech
were related to legitimate pedagogical concerns. If so, then they would be protected by qualified immunity because their alleged conduct would not be unconstitutional under the *Hazelwood* precedent. The court noted that “it is unclear if courts should ask whether a defendant’s actions were subjectively retaliatory or whether the retaliatory actions were objectively unrelated to a pedagogical goal. Nevertheless, under either standard, we conclude that the actions taken by Hinkley [the professor] and Dever [the supervisor] were sufficiently related to pedagogical goals that the claimed unconstitutional nature of their particular conduct was not clearly established” (852 F.3d at 987). The court continued:

> From an objective standpoint, Hinkley’s actions are related to legitimate pedagogical goals. Criticizing a student’s paper, even in harsh terms, and asking her to rewrite it relate to the pedagogical goals of encouraging critical analysis, avoiding unsupported generalizations, and maintaining focus on assigned material rather than a student’s general opinions. And requesting a superior attend class to assist with a potentially disruptive student cannot be deemed unreasonable... Teaching students to avoid inflammatory language when writing for an academic audience qualifies as a legitimate pedagogical goal. (852 F.3d at 988–989)

The court concluded with language suggesting continued deference to the educators’ determination of appropriate pedagogical goals. “Our case law does not suggest that federal courts are in the business of determining whether a term is actually inappropriate for an academic audience, to the extent appropriateness can be objectively defined. Short of turning every classroom into a courtroom, we must ‘entrust[] to educators these decisions that require judgments based on viewpoint’” (852 F.3d at 989–990, quoting *Fleming v. Jefferson County School District*, 298 F.3d 918, 928 (10th Cir. 2002)).
Section 8.2. Admissions

8.2.4. The principle of nondiscrimination.

8.2.4.6. Immigration status. The U.S. Court of Appeals for the Eleventh Circuit has upheld a policy of the Georgia Board of Regents that requires components of the University System of Georgia, to verify the “lawful presence” in the U.S. of the students they admit. Several applicants to these universities who were protected by the DACA program (Deferred Action for Childhood Arrivals) sued the presidents of the universities (Georgia State University, Augusta University, the University of Georgia, and the Georgia Institute of Technology), claiming that because of their participation in the DACA program, they were lawfully present in the United States. The plaintiffs alleged that this policy violated the equal protection clause of the Fourteenth Amendment as well as the supremacy clause. The trial court rejected all of the plaintiffs’ claims, determining that DACA did not give them “lawful presence” in the United States, and thus the policy, as applied to them, did not violate the Constitution.

Section 8.3. Financial Aid

8.3.8. Collection of student debts.

8.3.8.1. Overview of federal bankruptcy law. A federal appellate court ruled that a trustee in bankruptcy could claw back two years of tuition payments made to Sacred Heart University. In DeGiacomo v. Sacred Heart University, 942 F.3d 55 (1st Cir. 2019), the court explained that the parents of a student at Sacred Heart University had made two years of tuition payments while legally insolvent, and had subsequently pled guilty to fraud. The appellate court reversed a summary judgment ruling for the university, stating that the parents themselves received nothing
of value for the tuition payments, and that they were not legally required to pay tuition for an adult child.

Section 8.8. Student Records


Chapter 9

Student Academic Issues

Section 9.3 Online Programs

9.3.3. Student legal claims about online programs. Jurisdictional questions over students enrolled in online programs continue to arise. In Smith v. Maryville University of Saint Louis, 2019 WL 5967206 (D. Minn. 11/13/19), a federal district court rejected a claim by a student, Smith, that an institution based in Missouri could be sued in federal court in Minnesota, the student’s home state, based on the following actions by the institution:
(1) [the university’s] establishment of an Internet presence in Minnesota, including the purchase of advertisements that Smith alleges were directed at Minnesota and its provision of a unique username and password for Smith to use on Canvas; (2) the contract it formed with Smith via its online student handbook; and (3) the letters, emails, and Skype call exchanged between Smith and Maryville with regard to Smith’s alleged violation of the academic integrity policy.

Stating that the student’s claims raised issues of specific versus general jurisdiction, the court concluded that contacts between the student and the institution, which occurred online, were insufficient for purposes of specific jurisdiction. Additionally, in distinguishing cases relied upon by the student in which courts had asserted jurisdiction over online providers, *Perrow v. Grand Canyon Educ., Inc.* and *Watiti v. Walden University* (both covered in LHE6th Sec. 9.3.3), the court stated that in both those cases each institution had purposely availed itself of the forum by actively recruiting students in the state. In contrast, Smith did not allege that Maryville had actively recruited students from Minnesota. Instead, Smith had “reached out to Maryville to inquire about its program and to enroll.” The court also rejected assertions that the student handbook, letters to the student, or a Skype call created sufficient contacts to assert jurisdiction over Maryville.

**9.4. Academic Accommodations for Students with Disabilities**

**9.4.1. Overview.**

In a case with possible implications for students in medical programs—and potentially students in other fields who must take nationally administered standardized tests—a medical student sought a preliminary injunction against the National Board of Medical Examiners
(NBME) after she was denied requested accommodations on a standardized test, Step 1 of the United States Medical Licensing Examination (USMLE). The test was required for the student to continue in her medical studies. The NBME had denied the student’s initial request for accommodations, and she failed by one point to obtain the required score on the test in taking it without the requested accommodations. In re-taking the exam, the student again requested accommodations, such as additional time to complete the exam and taking the examination in a room with reduced distractions. The student had received these and other accommodations as a medical student from her institution. The student had been diagnosed as an undergraduate student with Attention Deficit Hyperactivity Disorder, migraine headaches, and “probable dyslexia.” Additionally, while in medical school, the student had been diagnosed with a blood clotting disorder that required medication.

In her initial request for an accommodation from NBME, the student had provided medical and educational records from high school and college. As shown in these records, the student had received accommodations in college and high school. In denying the first request for accommodations on Step 1 of the USMLE, NBME responded that, “‘Overall, the documents you provided do not demonstrate a record of chronic and pervasive problems with inattention, impulsivity, behavioral regulation, or distractibility that has substantially impaired your functioning during your development or currently.’” Further, NBME responded that the student had been able to “progress through primary and secondary school” without “grade retention, evaluation, or services and with an academic record and scores on timed standardized tests sufficient to gain admission to college, all without accommodations.” In applying for accommodations for re-taking of the test, the student provided materials from additional assessments and other supporting evidence, but the NBME again denied several requests for
accommodations, though based on the clotting condition, it did grant her additional break time, testing over a two-day period, and a separate testing room where she could stand, walk, or stretch. In appealing the decision, the student submitted documentation from an additional round of evaluation and assessment. The appeal and another request for reconsideration were denied by NBME, and the student sought a preliminary injunction to receive an accommodation of double time on the exam on the basis of Title III of the ADA and the Rehabilitation Act.

The NBME argued that the student’s overall academic success, lack of formal accommodations earlier in her education, and general educational success, including on the ACT and MCAT, showed that she was not disabled under the ADA or the Rehabilitation Act. NBME also relied on the conclusions of two of its consultants, each of whom disputed the findings in evaluations submitted by the student. The NBME experts did not conduct independent evaluations of the student. The court stated that “while performance is unquestionably an important factor to consider, the Regulations make clear that it is not the only consideration. And, the record here does reflect that Plaintiff has a history of having struggled with reading, visual perception, focus and attention beginning at least in the first or second grade.” The court noted that informal accommodations had been provided to the student in elementary school, such as use of an alphabet board, a seating assignment meant to reduce distractions, and allowing her to finish assignments during recess. Further, her academic struggles continued in middle and high school. In college, the student received a diagnosis of ADHE and of probable dyslexia, and requested accommodations during her college studies.

In deciding in favor of the student, the court concluded that the NBME had incorrectly had its experts focus on whether the student met the definition of a disability, with the court noting that, under the regulations, the definition of a disability should be interpreted “‘broadly in
favor of expansive coverage.” According to the court, NBME’s experts, in “re-analyzing the results of the numerous diagnostic tests that were administered” to the student improperly “focused on whether Plaintiff met the definition of a disability, rather than whether the covered entity had complied with their obligations” under the ADA and Rehabilitation Act. Additionally, the court concluded that the NBME “either discounted or disregarded entirely the admonition to focus on ‘how a major life activity is substantially limited, and not on what outcomes an individual can achieve’ and apparently ignored the example that ‘someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.’ 29 C.F.R. § 1630.2(j)(4)(iii).” The court determined that the NBME’s “exclusive focus” on prior academic success and her performance on the ACT and MCAT without accommodations was “improper” as the NBME failed to consider other evidence provided by the student. Further, the court faulted NBME for failing to give any weight to previous accommodations that had been provided to the student. The court, granting the preliminary injunction, concluded that the student was a qualified individual with a disability for purposes of the ADA and that she had established the likelihood of harm—being forced to withdraw from medical school—if not granted the requested preliminary relief of double time on the exam. At the time of this update, NBME was appealing the ruling.

9.4.2. Requests for programmatic or other accommodations.

9.4.2.1. Domestic Programs.
In *Gati v. Western Kentucky* University, 762 F. App’x 246 (6th Cir. 2019), a federal appeals court upheld a lower court ruling (see *LHE6th* pp. 1203-1204) in which the court determined that a university was not obligated under the ADA, the Rehabilitation Act, or the Kentucky Civil Rights Act (KCRA) to offer a disabled student enrolled in a master’s program the option of completing required residential courses offered at an institution’s main campus at either a satellite location or online.

### 9.4.2.3. Online programs.


As part of the consent decree, Harvard adopted a Digital Accessibility Policy that requires that university websites created on or substantially revised on or after December 1, 2019, will comply with the Worldwide Web Consortium’s Web Content Accessibility Guidelines version 2.1, Level AA Conformance (for these standards, see https://www.w3.org/WAI/standards-guidelines/wcag/). The agreement with Harvard covers such accessibility steps as the captioning of videos posted on university websites. The consent decree
specified that content covered under the agreement included audio or video content produced by university sponsored student organizations, content in massive open online courses (MOOCs), content “created and produced at Harvard and posted … on the official YouTube channel” and other third party platforms such as Vimeo, and the captioning of “legacy” content (i.e., produced before December 1, 2019) within two years of the execution of the consent decree or earlier if based upon a specific user request. Under the agreement, Harvard also agreed to provide “industry-standard live captioning for University-wide events,” such as commencement, that it would create a process for individuals to submit a captioning request, and that the university will “‘strongly urge’ all community members, including students, to: (1) caption all videos they create at the time they are produced, (2) caption all videos they post on third-party platforms; and (3) post content only on accessible third-party platforms.”

As covered in *LHE6th* pp. 1207-08, the National Federation of the Blind (NFB) has also supported plaintiffs in challenging the online accessibility for students. In *Payan v. Los Angeles Community College District*, 2019 WL 218138 (C.D. Cal. 5/21/19), the NFB joined with two students who are blind in successfully challenging the inadequacy of several accessibility accommodations under Title II of the ADA, including access to the college’s website, the college’s library electronic database, and a handbook used in a class that was not available in an electronic format.

In a later order, 2019 WL 3298777 (C.D. Cal. 7/22/19), the court ordered the community college to implement multiple corrective actions, including: (1) taking action to ensure that available library resources are “fully accessible to blind students,” (2) appointing or designating a dean of educational technology, (3) ensuring accessibility of the college’s website for blind students, and (4) ensuring that educational resources purchased or licensed from third party
vendors are accessible to blind students or that alternatives are made available to students in a “timely manner,” such as before or at the same time as for sighted students. For more on issues involving making digital course materials available to students with disabilities, see Lindsay McKenzie, “the Digital Courseware Accessibility Problem,” Inside Higher Ed, Dec. 2, 2019, available at https://www.insidehighered.com/digital-learning/article/2019/12/02/professors-colleges-and-companies-struggle-make-digital.

Section 9.5. Sexual Harassment of Students by Faculty Members

A student in social studies education program claimed that an institution had or should have had notice of a faculty member’s sex discrimination against the student but failed to adequately respond to or investigate the student’s complaints (Mosier v. State University of New York, 2020 WL 42830 (E.D. N.Y. 1/2/20). The student had lodged a complaint with other faculty member’s over the professor’s alleged conduct that was relayed to the institution’s Title IX office. The university contended that it had taken action and informed the student six months after her complaint that the allegations had been substantiated. For purposes of summary judgement, the court refused to dismiss the student’s Title IX claims based on allegations that the university was aware of the potential of the professor to sexually discriminate against students and the claim that the response period of six months could constitute deliberate indifference. The court stated that discovery should be allowed to continue regarding what ameliorative steps were taken after the student had complained of the professor’s actions and while he remained the faculty director for the program in which she was enrolled.

In Bose v. Bea, 947 F.3d 983 (6th Cir. 2020), a federal appellate court rejected a former student’s efforts to use a “cat’s paw” theory to establish institutional liability under Title IX
based on claims that a professor had threatened to make a student appear before an honor council in retaliation for rejecting the professor’s sexual advances. While the student was expelled for academic misconduct, the court stated that the former student had not established a “discriminatory motive” on the part of the institution and would not impute the professor’s alleged discrimination to the college. The appeals court, reversing the lower court, did conclude that the student’s claims based on defamatory statements made by the professor in the honor council hearing could proceed. As the matter took place at a private institution, the court rejected the argument that the professor’s comments made in the hearing satisfied the public benefit requirement to qualify for an absolute privilege under Tennessee law.

In granting three cases for review involving Title VII and discrimination in employment on the basis of sexual orientation or transgender status, the U.S. Supreme Court may also shed light on continuing questions over the applicability of Title IX to claims based on sexual orientation or gender status (Adam Liptak & Jeremy W. Peters, “Supreme Court Considers Whether Civil Rights Act Protects L.G.B.T. Workers,” N.Y. Times, Nov. 7, 2019, available at https://www.nytimes.com/2019/10/08/us/politics/supreme-court-gay-transgender.html). At the time of this update, the Court had heard oral arguments in the cases, but with decisions in each of the cases yet to be issued.

Section 9.6. Academic Dismissals and Other Academic Sanctions

9.6.3. Constitutional issues. A federal appellate court rejected a student’s claims that a university violated his due process and equal protection rights for dismissing the student for cheating on an exam when the student had submitted evidence, including from two experts, that he did not cheat or plagiarize on the final exam (Patel v. Texas Tech University, 941 F.3d 743
Rejecting the student’s claims, the court stated that under cases such as *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), a court should extend substantial deference to the review of academic decisions. The court added that this “exceedingly narrow scope for judicial review of academic decisions applies to both due process and equal protection claims.”

The issue of professionalism and student speech rights was at issue in *Hunt v. Board of Regents of University of New Mexico*, 2019 WL 60003284 (10th Cir. 11/14/9). A medical student was subjected to discipline under the professionalism standards for the medical school based on comments he made on his personal Facebook page deriding individuals who supported the Democratic party or its candidates. The student was placed on and successfully completed a “‘professionalism enhancement prescription,’” which consisted of working with a series of faculty mentors. In refusing to reverse a lower court’s determination that administrators at the university were entitled to qualified immunity, the court noted the unsettled nature of the law concerning the legal standards applied to the off-campus speech of graduate students at public colleges and universities:

…”[D]ecisions from our court and other circuits have not bridged the unmistakable gaps in the case law, including whether: (1) *Tinker* applies off campus; (2) the on-campus/off-campus distinction applies to online speech; and (3) *Tinker* provides an appropriate framework for speech by students in graduate-level professional programs, such as medical schools, *cf. Salehpoor v. Shahinpoor*, 358 F.3d 782, 787 & n.5 (10th Cir. 2004) (applying the public-employee analysis to speech by a graduate-level engineering student). (2019 WL 6003284, at *8)
Professionalism standards and student speech were also at issue in *Felkner v. Rhode Island College*, 203 A.3d 433 (R.I. 2019). In the case, a master’s student in social work program secretly tape recorded a conversation with a professor and then posted a “rough” transcript of the conversation to a website that he had created. The professor initiated a complaint against the student on the grounds that the surreptitious recording of their conversation violated professionalism standards that applicable to students in the social work program. After a committee found the student in violation of relevant professionalism standards because of the recording, the student pledged that he would no longer record his social work colleagues without consent. Another dispute later arose over program officials rejecting the student’s plans to complete a field placement in the Rhode Island’s governor’s office working on welfare reform, but the placement was eventually approved.

Amid ongoing disputes with program faculty and officials, the student filed a lawsuit in which, among his claims, he argued that he had been deprived of his free expression rights, had been subjected to unconstitutional conditions as a requirement of being able to continue in the program, and had suffered retaliation for his political views and for criticizing the institution for having a liberal bias. In an amended complaint, the student also argued that the school had violated his procedural due process rights in its handling of the complaint over the secret recording. Reversing the lower court, the Supreme Court of Rhode Island ruled that, at this stage of litigation, sufficient evidence existed in the record for a factfinder to consider whether the actions taken against the student “were truly pedagogical or whether they were pretextual.” 203 A. 3d at 450. The court also reversed the lower court’s summary judgment in favor of defendants on the
student’s retaliation claim, compelled speech claim, and unconstitutional conditions claim.

Chapter 10  
Student Disciplinary Issues

Section 10.1. Disciplinary and Grievance Systems

10.1.3. Codes of conduct. A federal appeals court, in Doe v. Valencia College, 903 F.3d 1220 (11th Cir. 2018), upheld the lower court ruling in Koeppel v. Romano, 252 F. Supp. 3d (1310) (M.D. Fla. 2017), a case noted in LHE6th p. 1279, that a college could discipline a student for harassing text messages sent off campus to another student.

10.1.4. Judicial systems.

Considering claims by a student expelled for sexual misconduct, a federal district court rejected the argument that the student was entitled to have legal representation in a student disciplinary proceeding. Doe v. Northern Michigan University, 393 F. Supp. 3d 683 (W.D. Mich. 2019). The court stated that the U.S. Court of appeals had recognized only two scenarios in which an accused student may have a constitutional right to counsel in an academic disciplinary proceeding: (1) if the hearing is unusually complex or (2) when the university uses an attorney in the investigation or decision-making process… Neither scenario is present here. (393 F. Supp. 3d at 695) The court did, however, decide that the student had sufficiently alleged other deficiencies to avoid dismissal of all the student’s claims.
Section 10.2. Disciplinary Rules and Regulations

10.2.2. Public institutions

A case involving a nursing student, R.W. v. Columbia Basin College, No: 4:18-CV-5089-RMP (E.D. Wash. 10/4/19), dealt with a student’s off-campus comments to a mental health worker about homicidal thoughts toward faculty members in the nursing program. Following the individual’s discharge from voluntary inpatient counseling and evaluation, the mental health professional believed that she had a duty to warn regarding the student’s homicidal thoughts. She contacted the local police department, which in turn contacted the college’s campus security. The college’s campus conduct office was also informed. The student was barred on an interim basis from campus, and, following a conduct proceeding, was issued a trespass order until he could gain readmission to the nursing program, participate in counseling, and complete a mental health evaluation.

The student challenged the college’s actions as impermissible on First Amendment grounds. The college argued that the “school violence” cases developed under the Tinker standards (see LHE6th Sec. 10.4.1) should apply to the student’s speech. The court rejected this argument, stating that while the U.S. Court of Appeals for the Ninth Circuit had “extended the Tinker doctrine to encompass off-campus, identifiable threats of violence for high school students, neither the Supreme Court nor the Ninth Circuit has extended Tinker to college campuses.” The court also stated that the Ninth Circuit had not “addressed” college campuses in its consideration of recent “school violence” cases decided in the circuit. Instead of Tinker, the court considered the speech under “general First Amendment principles.” Under a true threat analysis the court, granting summary judgment to the student on this issue, concluded that the
student’s speech did not constitute a true threat and was protected speech because “no reasonable factfinder could conclude that [the student] had the requisite intent to transform his statements into true threats to intimidate his instructors,” as the student did not communicate or intend to communicate his thoughts to nursing faculty members. Further, the court concluded that university officials were not entitled to qualified immunity on this issue. However, the court did conclude that whether the student posed a direct threat so as to justify the institution’s actions was a genuine issue of material fact.

Section 10.3. Procedures for Suspension, Dismissal, and Other Sanctions

10.3.3. Private institutions.

In Shaw v. Elon University, 400 F. Supp. 3d 360 (M.D. N.C. 2019), a federal court held that under North Carolina law, the “policies, procedures, alleged obligation, and tenets outlined” in a private university’s handbook did not constitute an enforceable contract. The court distinguished several recent North Carolina state court cases where courts had allowed a contract theory to survive a motion to dismiss. The case provides a helpful reminder of how, even though the student-institutional relationship is often viewed at least in certain aspects as a type of contractual relationship, the laws of specific states can differ in important respects on when a student and institution are considered to have entered into a legally enforceable contract based on documents such as student handbooks.

Section 10.4. Student Protests and Freedom of Speech

10.4.1. Student free speech in general.
A national organization of students, parents, faculty and “concerned citizens,” called Speech First, has initiated litigation against several public universities, alleging that certain university student conduct regulations violate their First Amendment free speech rights. In *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), the organization challenged the University of Michigan’s policy prohibiting harassing and bullying behavior and its use of a Bias Response Team to investigate complaints. The plaintiffs alleged that the policy was unconstitutionally broad and that the Bias Response Team’s suite of disciplinary sanctions suppressed otherwise lawful student speech. The plaintiffs sought to enjoin the university from enforcing its policy and from using the most severe of the possible sanctions.

At the trial court level, the judge rejected the plaintiffs’ motion for an injunction, questioning whether the plaintiffs had standing, and noting that the university had changed its policy after the lawsuit was initiated, making their claims moot. 333 F. Supp. 3d 700 (E.D. Mich. 2018). The appellate court, in a 2-1 ruling, reversed and remanded that ruling.

The appellate court noted that the university had changed the policy so that it tracked state law, which the plaintiffs had not claimed was unconstitutional. But, said the court, there was nothing to stop the university from reinstating a broader prohibition, and thus the matter of the preliminary injunction was not settled. With respect to the plaintiffs’ challenge to the authority of the Bias Response Team, the court said:

The Response Team's page on the University's website defines a "bias incident" as "conduct that discriminates, stereotypes, excludes, harasses or harms anyone in our community based on their identity (such as race, color, ethnicity, national origin, sex, gender identity or expression, sexual orientation, disability, age, or religion)." Causing a bias incident is not punishable under the Statement, unless the conduct that caused the
bias incident violated some policy in the Statement. Speech First contends, however, that the term "bias incident" is overbroad and that the Response Team's practices in responding to bias incidents intimidate students, quashing their speech. (939 F.3d at 762) Although the Response Team itself did not have the authority to mete out discipline, it could refer individuals accused of violating the harassment and bullying policy to the student conduct office or the police. The appellate court explained that the mere threat of such a referral is a real consequence that objectively chills speech. The referral itself does not punish a student—the referral is not, for example, a criminal conviction or expulsion. But the referral subjects students to processes which could lead to those punishments. The referral initiates the formal investigative process, which itself is chilling even if it does not result in a finding of responsibility or criminality. . . . Furthermore, nothing in the record suggests that the Response Team may refer matters only if the reporting student assents. By instituting a mechanism that provides for referrals, even where the reporting student does not wish the matter to be referred, the University can subject individuals to consequences that they otherwise would not face. (939 F.3d at 765)

The appellate court did not accept the plaintiffs’ invitation to order the trial court to issue the preliminary injunction, but it did reverse the lower court’s rulings that the plaintiffs had standing and that the challenge to the policy was moot because it had been changed. The dissenting judge disagreed with all of these rulings, stating that she believed that the plaintiffs did not have standing and that the challenge to the policy was moot.

Speech First filed a similar lawsuit against Iowa State University in January of 2020, claiming that certain of its regulations (prohibitions against chalking on sidewalks, stating that
only registered student organizations can advertise campus events, prohibitions on the use of
campus email to communicate about campaigns and ballot issues) suppress student speech in
violation of the First Amendment. The organization has also sued the University of Texas and
the University of Illinois; these cases had not yet been tried as of January 2020.

Chapter 11

Rights and Responsibilities of Student Organizations and Their Members

Section 11.1. Student Organizations

11.1.3. Mandatory student activity fees. A federal appellate court, in a decision in which it
reversed the lower court (see LHE6th at p. 1387 for a discussion of the lower court opinion),
considered the permissibility under viewpoint neutrality standards of a student government
eliminating all funding previously made available from mandatory student fees for student media
organizations. Koala v. Khosla, 931 F.3d 887 (9th Cir. 2019). The student government took the
action after a satirical article in a student newspaper that received fee funding offended numerous
individuals on campus. The court ruled that the student newspaper’s free speech press claims
were sufficient to survive a motion to dismiss. Additionally, it held that the lower court
improperly classified the limited public forum at issue as only encompassing the available
funding for student media. Instead, stated the court, the relevant forum should encompass the
entire student activity fund. The court remanded to the lower court to reconsider whether
viewpoint discrimination had taken place in light of how the appellate court defined the forum.

In another mandatory fee case, Apodaca v. White, 401 F. Supp. 3d 1040 (S.D. Cal. 2019),
members of a student organization at a public university challenged the permissibility of
mandatory student fees used to support student organizations. The student group relied on Janus v. AFSCE, 134 S. Ct. 2448 (2018) (for a discussion of this case, see p. 359 LHE6th Sec. 4.5.3), a case in which the U.S. Supreme Court ruled that it was impermissible to require public employees to pay union fees to public sector employee unions. In Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217 (2000), a case in which the Supreme Court approved of the constitutionality of using mandatory student fees to support student organizations, the Court had relied on Abood v. Detroit Board of Education, 431 U.S. 209 (1977), which was overruled in Janus. (The Southworth decision is discussed in LHE 6th beginning at p. 1381.) The court rejected the students’ argument that the Janus case had also invalidated Southworth, stating its belief that “Janus bears little significance in the public university context where the case law and the parties all agree that schools have expansive latitude in the manner educational missions are implemented.” 401 F. Supp. 3d at 1053. But, the court did agree with the students that the university violated viewpoint neutrality standards in how it had distributed funding to student organizations. Future claimants may well make similar claims arguing that Janus has negated the standards announced in Southworth.

11.1.4. Principle of nondiscrimination. Conflicts between institutions and certain religious student organizations have continued since the U.S. Supreme Court’s decision in Christian Legal Society v. Martinez (discussed in LHE6th beginning at p. 1391). Two court opinions involving Intervarsity Christian Fellowship and public universities, in which the universities refused or withdrew recognition of the student chapters of this national organization because the organizations’ requirement that chapter leaders embrace Christian religion, were published in the fall of 2019.
In the first case, *InterVarsity Christian Fellowship/USA et al. v. Board of Governors of Wayne State University*, 2019 U.S. Dist. LEXIS 160351 (E.D. Mich. 9/20/19), the student chapter of InterVarsity challenged the decision of administrators at Wayne State University in 2017 to withdraw recognition to the organization because it required its leaders to be Christians. The University explained that this requirement violated its nondiscrimination policy. A chapter of InterVarsity had been active on the Wayne State campus for 75 years and had been previously recognized by Wayne State as an official student organization. InterVarsity claimed that this decision violated the members’ First Amendment rights of free speech and free exercise of religion, the First Amendment’s establishment clause, the Fourteenth Amendment’s due process and equal protection clauses, and provisions of Michigan’s constitution and state nondiscrimination act. Wayne State filed a motion to dismiss all of the claims.

In addition to its constitutional claims, InterVarsity alleged that Wayne State selectively enforced its nondiscrimination policy—for example, by permitting single sex Greek organizations and club athletic teams, affinity groups based upon religion or race/ethnicity, as well as a student church group to be recognized.

With respect to InterVarsity’s speech claims, the court rejected Wayne State’s argument that *Martinez* required dismissal of these claims, stating that the nondiscrimination policy in *Martinez* was different enough from the language in Wayne State’s policy such that *Martinez* was not controlling. The court rejected the University’s motion to dismiss the free speech and constitutional claims.

The second case, *InterVarsity Christian Fellowship/USA et al. v. University of Iowa et al.*, 2019 U.S. Dist. LEXIS 176634 (S.D. Iowa 9/27/19), addressed issues similar to those in the previous case. Although the approach to recognizing student organizations by the University of
Iowa was somewhat different than that of Wayne State, the University refused to recognize InterVarsity because of its requirement that leaders be members of the Christian faith, while other sex-, race- or religion-exclusive organizations at Iowa only required organization members to state their agreement with the mission of the organization, whether or not they were members of the religion, race or gender at issue.

The plaintiff students and their national organization alleged violations of the First Amendment (free speech, free exercise, freedom of association), the Fourteenth Amendment (equal protection), and Iowa’s constitution and law against discrimination. The court applied strict scrutiny analysis to the First Amendment claims and concluded that the plaintiffs’ allegations of selective enforcement of the University’s nondiscrimination policy, where exceptions were allowed for organizations with secular purposes but not religious ones, was viewpoint discrimination and did not pass the strict scrutiny test. The court granted summary judgment to the plaintiffs on their free speech, expressive association and free exercise of religion claims.

The court rejected the plaintiffs’ claim that they were protected by the “ministerial exception” to federal nondiscrimination laws as discussed in the Hosanna Tabor case (discussed in LHE6th at pp. 574-76), as had the trial court in the Wayne State case discussed above, because the ministerial exception only applies as an affirmative defense to an employment discrimination lawsuit. It also rejected, as had the court in the Wayne State case discussed above, the University’s claim that the Martinez precedent protected its actions because the University’s policy was not an “all comers” policy such as the policy at issue in Martinez. The court awarded summary judgment to the University on the plaintiffs’ First Amendment religious clauses claims, stating that their success on the free exercise clause claim provided the required protection.
The plaintiffs sought a permanent injunction against the University’s future denial of recognition to InterVarsity. The court noted that, while the litigation was pending, the Iowa Legislature had enacted a law that would limit the University’s ability to refuse to recognize organizations such as InterVarsity:

a public institution of higher education shall not deny any benefit or privilege to a student organization based on the student organization's requirement that the leaders of the student organization agree to and support the student organization's beliefs, as those beliefs are interpreted and applied by the organization, and to further the student organization's mission. (Iowa Code § 261H.3(3))

Because the court said that it was uncertain that the new law would survive a court challenge, the court issued a permanent injunction prohibiting the University from enforcing its nondiscrimination policy against InterVarsity based upon the content of its leadership selection policies.

Proposed rules under the Trump administration could effectively circumvent the standards announced in Christian Legal Society v. Martinez and the center of dispute in the aforementioned cases involving InterVarsity Christian Fellowship. 85 Fed. Reg. 3190 et seq.; see also Kery Murakami, “Tying Grant Eligibility to Religious Freedom,” Inside Higher Ed, Feb. 7, 2020, Inside Higher Ed, available at https://www.insidehighered.com/news/2020/02/07/colleges-worry-about-implications-religious-freedom-rule. The proposed rules would, as a condition for federal grant eligibility, require public colleges and universities to allow student religious groups to base criteria for membership or leadership on the group’s religious beliefs, even if such standards could exclude individuals on the basis of sexual orientation or gender identify. Private institutions would be held to the standards published in relevant institutional policy and rules,
such as student handbooks. The decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), was cited as supportive legal authority for the proposed rule (for discussion of *Trinity Lutheran*, see *LHE6th* Sec. 11.1.4 and Sec. 1.6.4).

11.2.2. *Institutional recognition and regulations of fraternal organizations.* As covered in *LHE6th* at p. 1415, Harvard University has enacted a policy that excludes undergraduate students who join single-sex social organizations from eligibility for certain leadership positions and to receive certain scholarships. Several single-sex social organizations have challenged the permissibility of the policy in state court. *Alpha Phi International Fraternity v. President and Fellows of Harvard College*, 2020 WL 741544 (Mass. Super. 1/14/20). The court ruled that the plaintiffs had alleged sufficient allegations to support a claim under the Massachusetts Civil Rights Act. It also decided that discovery should proceed on the plaintiffs’ claim of tortious interference with advantageous relations.

Section 11.3. The Student Press

11.3.2. *Mandatory student fee allocation to student publications.* See discussion above of *Koala v. Khosla* in updates under Sec. 11.1.3 for a case involving a challenge to a student government’s decision to make all student media ineligible for funding provided through student fees.

Section 11.4. Athletic Teams and Clubs

11.4.5. *Athletic scholarships.* California passed a law that will allow college athletes to earn compensation for the use of their likeness, to enter into endorsement agreements, and to hire agents for representation. Colin Dwyer, “California Governor Signs Bill Allowing College
Athletes to Profit from Endorsements,” NPR, Sept. 30, 2019, available at
https://www.npr.org/2019/09/30/765700141/california-governor-signs-bill-allowing-college-
athletes-to-profit-from-endorsement. Other states are considering similar legislation, and federal
legislation has also been introduced. Matt Norlander, “Fair Pay to Play Act: States bucking
NCAA to let athletes be paid for name, image, likeness,” CBSSports.com, Oct. 3, 2019, available
at https://www.cbssports.com/college-football/news/fair-pay-to-play-act-states-bucking-ncaa-to-
let-athletes-be-paid-for-name-image-likeness/. Even as the NCAA now permits colleges to cover
the full cost of attendance for athletes on scholarship, including being able to provide stipends,
California’s law and bills pending at the federal and state levels result in a conflict with current
NCAA amateurism rules. The NCAA will be forced to chart a response to such laws, which may
include a revision to current NCAA rules to permit current college athletes to profit from their
name and likeness and to enter into endorsement deals.

11.4.9. Tort liability for athletic injuries. While deciding on different grounds than the lower
court (see LHE6th at p. 1506), the Supreme Court of Pennsylvania held that a college had a
“duty to provide duly licensed athletic trainers for the purpose of rendering treatment to its
student athletes participating in athletic events,” which included a football practice in which the
two plaintiffs were injured. Feleccia v. Lackawanna College, 215 A.3d 3 (Pa. 2019).
Additionally, the court determined that a genuine issue of material fact existed as to whether the
college violated this duty. The court also ruled that waivers signed by the athlete plaintiffs in the
case did not apply to acts of gross negligence or recklessness.
Chapter 13

The College and State Government

Sec. 13.5. Other State Regulatory Laws Affecting Postsecondary Education Programs

13.5.3. Open records laws.

p. 1658. Another court has found that a foundation linked to a public university is not subject to the state’s open public records act. In Transparent GMU v. George Mason University, the Virginia Supreme Court held that George Mason College Foundation did not qualify as a covered entity subject to the Virginia Freedom of Information Act. The case is available at https://www.opengovva.org/transparent-gmu-v-george-mason-university-order. Noting whether the act covered a private nonprofit foundation represented an issue of first impression, the court ruled that it did not. In deciding that the foundation was not subject to the open records law, the court stated that the foundation and the university were separate entities, did not receive public funds, and that the foundation did not operate as an agent of the university for purposes of the act.

Chapter 14

Section 14.5. Civil Rights Compliance

14.5.2. Title VI. Legal battles over the use of race conscious admissions policies continue. Recent litigation has focused on practices at private institutions and whether particular race conscious policies violate Title VI. Harvard University was sued under Title VI for alleged discrimination against Asian Americans in admissions. Students for Fair Admission, Inc. v. President and Fellows of Harvard College, 397 F. Supp. 3d 126 (D. Mass. 2019). Harvard
acknowledged its use of race in admissions, but countered that it did so in a legally permissible manner. Considering the claims against Harvard under Title VI, the court applied the same standards announced by the U.S. Supreme Court in reviewing, for a second time, the race-conscious admissions policies at the University of Texas at Austin. *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016) (commonly referred to as *Fisher II*) (see *LHE6th* Sec. 8.2.5 for more on affirmative action in admissions). In an opinion in which the court spent considerable space parsing through dueling statistics, the court concluded that Harvard’s race conscious admissions practices did not violate Title VI and discriminate against Asian Americans. Students for Fair Admission have appealed the decision.

Efforts continue to settle a longstanding legal dispute in Maryland claiming inequitable funding for Historically Black Colleges and Universities in the state. Plaintiffs and the governor have been at odds over the amount of funding that would be acceptable in a settle agreement. Legislation has also been introduced in an effort to bring the legal action to a close. See Ovetta Wiggins, “Maryland House Speaker Jones pushes bill to force settlement of HBCU lawsuit,” *Washington Post*, Feb. 7, 2020, available at https://www.washingtonpost.com/local/md-politics/maryland-house-speaker-jones-pushes-bill-to-force-settlement-of-hbcu-lawsuit/2020/02/06/504dece8-494d-11ea-b4d9-29cc419287eb_story.html.

14.5.3. Title IX.

14.5.3.1. Overview. *LHE6th* at p. 1888 outlined standards in Title IX regulations proposed by the Trump administration in late 2018. At the time of this update, the new regulations were reportedly close to being released. See Erica L. Green, “New Campus Sexual Misconduct Rules

As covered in this update for Sec. 9.5, the U.S. Supreme Court has granted review in three cases involving Title VII and discrimination in employment on the basis of sexual orientation or transgender status. The outcomes in these cases may also shed light on questions over the applicability of Title IX claims based on sexual orientation or gender status (Adam Liptak & Jeremy W. Peters, “Supreme Court Considers Whether Civil Rights Act Protects L.G.B.T. Workers,” *N.Y. Times*, Nov. 7, 2019, available at https://www.nytimes.com/2019/10/08/us/politics/supreme-court-gay-transgender.html).

14.5.3.3. Claims by accusing students. The circumstances under which institutions may be found liable under Title IX for failing to prevent or adequately addressing claims of peer sexual harassment continue to generate litigation. *LHE6th* at p. 1896 covered *Farmer v. Kansas State University*, 2017 WL 980460 (D. Kan. 3/14/17). In affirming the decision, 918 F.3d 1094 (10th Cir. 2019), a federal appellate court agreed that the plaintiff presented plausible allegations that the university had sufficient control over an off-campus fraternity house to sustain a deliberate indifference claim. After receiving the student’s complaint of sexual assault at the fraternity house, the university responded to the student that it would not investigate a rape that took place off campus and was unrelated to a university program or activity.

In seeking summary judgment, the university looked to cases that included *Roe v. St. Louis University*, 746 F.3d 874 (8th Cir. 2014), a case in which the court concluded that an off-campus rape was not under the institution’s control so as to support a deliberate indifference claim. However, in *Farmer* the court determined that the plaintiff sufficiently alleged that the
university had substantial control over the fraternity and the off-campus residence for Title IX purposes to sustain a claim. (See also Weckhorst v. Kansas State University, 241 F. Supp. 3d 1154 (D. Kan. 2017), affirmed, 918 F.3d 1094 (10th Cir. 2019).) (See McNeil v. Yale University, 2020 WL 495061 (D. Conn. 1/30/20), for a recent case in which the court rejected that sufficient institutional control existed over fraternity housing to support a Title IX claim against the university.)

For a recent case in which a federal appellate court, affirming the lower court, rejected claims by three students that a university had violated Title IX by failing to protect them from stalking and sexual harassment by another student, see Pearson v. Logan University, 937 F. 3d 119 (8th Cir. 2019) (per curiam). See also Kollaritsch v. Michigan State University Board of Trustees, 944 F.3d 613 (6th Cir. 2019), and Karasek v. Regents of University of California, 2020 WL 486786 (9th Cir. 1/30/20), for two federal appellate court cases where courts dismissed claims that universities had responded with deliberate indifference in how they responded to reports of sexual harassment by students.

In Feminist Majority Foundation v. Hurley, 911 F.3d 674 (4th Cir. 2018), reversing the lower court in part, a federal appellate court ruled that members of student feminist organization (Feminists United) sufficiently alleged in their complaint that a university failed to adequately respond to sustained incidents of cyberbullying on the social media platform Yik Yak (now defunct), so as to constitute deliberate indifference under Title IX. The court, rejecting the university’s argument that it lacked substantial control over incidents and comments that took place on Yik Yak, noted that the complaint alleged that the institution could have taken additional steps to stop the harassment and intimidation of the students, which was taking place on campus through the use of the social media platform. These potential steps included disabling
Yik Yak on campus, seeking to identify students who were making threats on the social media site, and taking more direct and forceful steps to stop the threatening behavior against the students, such as having “mandatory assemblies to explain and discourage cyber bullying and sex discrimination.” The court rejected the contention that the university faced potential First Amendment hurdles in regulating the comments on Yik Yak, with the court stating that the threatening conduct of the type alleged in the complaint was not protected by the First Amendment.

The appellate court in Feminist Majority Foundation also ruled that the institution could be liable for “student-on-student retaliatory harassment” under Title IX. The retaliation claim was based on alleged threats and intimidation that resulted from the publication of a newspaper column by one of the plaintiffs speaking out against sex discrimination at the university and in response to suspension of activities by the university rugby team for inappropriate conduct. The court rejected the university’s arguments that the retaliation claim was duplicative of the sex discrimination claim and that student-on-student harassment could not, as a matter of law, be used to sustain a retaliation claim against the university. Instead, the court stated that the complaint “plainly faults [the university] for its failure—over several months—to address and seek to eliminate retaliatory harassing conduct [against the students].” According to the court, “[i]n sum, if an educational institution can be liable for student-on-student sexual harassment, … it can also be liable for student-on-student retaliatory harassment.” 911 F.3d at 696.

Besides litigation and federal regulatory guidance, state law may also serve to impose obligations on institutions concurrent to or in addition to those required under Title IX. For example, Pennsylvania passed legislation in 2019 that, among its provisions, requires colleges and universities in the state to create online, anonymous systems for students and employees to
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report sexual assaults (Marc Levy, “Pennsylvania Orders Stronger Sex Assault Reporting on
Campus,” Associated Press, July 8, 2019, available at
https://www.apnews.com/6cc2b7eb8d6a4768ac3bd1a393ea6933). The law also mandates that
witnesses or victims reporting a sexual assault are to be exempted from being charged with a
violation of an institution’s drug or alcohol policy. As another example, Texas passed legislation
in 2019 that comes with requirements for employees to report complaints of sexual harassment
or sexual violence (see Katherine Mangan, “Texas Professors Could be Criminally Charged if

14.5.3.4. Claims by accused students. Students accused of sexual misconduct continue to
challenge conduct actions taken against them as violative of their rights under Title IX, as well as
asserting challenges based on constitutional due process or equal protection grounds, breach of
contract, or state tort standards.

A key issue that has emerged, one that has resulted in a seeming split among federal
appellate courts, involves the extent to which accused students should be able to engage in cross-
examination in conduct proceedings. In Doe v. Baum, 903 F.3d 575 (6th Cir. 2018), the court
held that a university violated a student’s due process rights in denying him cross-examination in
a conduct hearing for sexual misconduct that turned on issues of witness credibility. The court
stated in its opinion that “if a university is faced with competing narratives about potential
misconduct, the administration must facilitate some form of cross-examination in order to satisfy
due process.” 903 F.3d at 581. A university investigator had concluded that the student should
not be found in violation as the evidence in favor of a finding of misconduct was not “more
convincing” than evidence offered to establish that the student was not in violation. A university appeals panel that reviewed the investigator’s report decided differently, concluding that issues of evidence and witness credibility favored a finding of misconduct on the part of the student. The court looked to the lack of cross-examination as also supportive of the student’s Title IX claim of erroneous outcome to survive a motion to dismiss.

In contrast to Doe v. Baum, a federal appellate court in Haidak v. University of Massachusetts-Amherst, 933 F.3d 56 (1st Cir. 2019), decided to “stop short” of imposing a cross-examination requirement. As to mandating that accused students be able to engage in cross-examination in conduct hearings that involved issues of credibility, the court in Haidak stated,

We stop short of adopting that latter pronouncement [cross-examination] because we have no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation. We also take seriously the admonition that student disciplinary proceedings need not mirror common law trials. (933 F.3d at 69)

While not specifically turning on the issue of cross-examination, but in a case involving witness credibility issues, a federal appellate court held that a student had sufficiently alleged defects in the process used to find him in violation of the university’s sexual harassment standards. Doe v. Purdue University, 928 F.3d 652 (7th Cir. 2019).

The court noted that two of three panel members on the committee that found the student in violation admitted to not having read the investigative reports, “which suggests that they decided that [the student] was guilty based on the accusation rather than the evidence.” 928 F.3d at 663. Additionally, the court found it “particularly concerning” that committee members had concluded that the accusing student was “the more credible
witness—in fact, that she was credible at all—without ever speaking to her in person.”

928 F.3d at 664.

Chapter 16

Sec. 16.4. The College as Research Collaborator and Partner

16.4.2. The research agreement. The lower court decision in Partlow v. Kennedy Krieger Institute, Inc., 2017 WL 4772626 (Md. Ct. Spec. App. 10/23/17), covered in LHE6th at p. 2017, involved claims brought by a sibling of a participant in a KKI research study. Affirming the lower court, the Court of Special Appeals of Maryland ruled in Partlow v. Kennedy Krieger Institute, Inc., 191 A.3d 425 (2018), that the special relationship between KKI and the study’s participants, which was established in earlier litigation, also encompassed the plaintiff. In affirming the decision, the Court of Appeals of Maryland stated:

Here, we hold that a duty of care exists in the limited circumstances where:

(1) a medical research institute knows of the presence of a child, who is not a participant in a research study concerning lead-based paint abatement of a property, who resides at a property that is subject to the research study during a participant child’s enrollment in the study; (2) the medical research institute has signed a consent agreement with a parent or guardian for a participant child’s enrollment in the research study and both the participant and non-participant children reside at a property subject to the study; (3) the medical research institute knows or should know of the presence or suspected presence of lead in the property; (4) the medical research institute determined the level of
lead-based paint abatement for the property; and (5) the non-participating child who resided at the property during the research study was allegedly injured by being exposed to lead at the property. The bottom line is that we hold that, under the circumstances alleged in this case, considering the record in a light most favorable to the non-moving party, on the question of duty, it was error to grant summary judgment in favor of KKI on grounds that KKI owed no duty of care . . . under the common law. 191 A.3d at 449–50.